



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: OCTOBER 07, 2022

IN THE MATTER OF:

Appeal Board No. 612287

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination (November 4, 2019) to International Business Promotion, Inc. (hereafter "IBP") holding that IBP is liable for tax contributions effective first quarter 2018 based on the independent contractor misclassification of EH (hereafter the "claimant"), and any other individual similarly employed by IBP as an administrative assistant¹ deemed to be in covered employment, and that credited the claimant with remuneration from IBP regarding the claim for benefits effective September 23, 2019. (Combined Appeal Board Nos. 612243 & 612287 and A.L.J. Case Nos. 020-03355 & .)

The Department of Labor issued the initial determination (November 4, 2019) to NHK Cosmomedia America, Inc. (hereafter "NHK") holding that it is not the true employer of the claimant, and that credited the claimant with remuneration from IBP regarding the claim for benefits effective September 23, 2019.

(Combined Appeal Board Nos. 612285 & 612286 and 020-03352 & 020-05593.)

IBP requested a hearing, contending that the claimant and all other individuals similarly employed performed services as independent contractors.

The Administrative Law Judge held a combined telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of IBP, NHK, the claimant, and the Commissioner of Labor. By combined decisions filed August 25, 2020, the Judge overruled all initial determinations, held IBP not to be

the true employer, and held NHK to be the true employer and liable for tax contributions for the claimant's remuneration as covered employment (an any other individual similarly employed as an administrative assistant).

NHK appealed the Judge's decision to the Appeal Board. IBP also appealed, contending that the claimant was not an employee of NHK but an independent contractor of IBP. The Board considered the arguments contained in the written statements submitted on behalf of NHK and IBP.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: IBP is in the business, in part, of recruiting and referring individuals to its business clients for their staffing needs. IBP is solely owned and operated by its CEO. IBP mainly places individuals fluent in Japanese and English with Japanese companies in the U.S.

The claimant is an individual who is fluent in Japanese and English. In or about late 2013, the claimant answered an IBP job advertisement on Indeed.com for an administrative position. IBP reviewed the claimant's r§sum§ and

interviewed the claimant over the telephone. Thereafter, the claimant was referred to a Japanese company (NTT DOCOMO) where she worked full-time in or about 2013-2014 until the company closed.

NHK operates a television station that produces and broadcasts to Japanese viewers in the U.S. and Canada and was IBP's long-term client for which it provided staffing services. In 2017, NHK sought to fill a Japanese and English bilingual administrative position to assist the production staff about three days per week. IBP offered NHK's position to the claimant, with whom IBP was already familiar and who was a prime candidate for the job. IBP arranged a meeting between the claimant and NHK. Upon NHK's satisfaction, IBP offered the position to the claimant at \$24 per hour, which the claimant accepted.

IBP and NHK executed several IBP's Staffing Agreements for the entire time the claimant was engaged, e.g., from April 1, 2019 through March 31, 2020, that contain, in relevant part, the following provisions:

* The duties of the "temp worker" shall be "bookkeeping, data entry and general administrative tasks, using Japanese and English language skills in the office. This temporary parttime work generally requires 3 or 4 weekdays,

which is about 20 to 35 hours a week."

- * Per request of NHK, IBP will find appropriate personnel via advertising, in-house database, or headhunting. Upon finding a candidate, IBP will "send a resume of the potential candidate to [NHK] for review", and thereafter IBP "will arrange an interview" with NHK.

- * NHK will pay \$38 per hour to IBP [modified downward from \$40 in a prior Staffing Agreement], and IBP will pay \$24 per hour to the claimant.

- * NHK "will not hire or solicit the employment of any candidate introduced by" IBP during the effective period of this "Agreement and thirty-six months thereafter". If this term is breached, NHK shall be liable to IBP in the amount equal to the candidate's salary for "six months".

- * NHK agrees ensure the claimant's safety by not working at a "warehouse, factory, or any other dangerous place where physical work is involved".

- * NHK agrees that the claimant will not be required to participate in any trip (travel) at any time.

- * NHK agrees that the claimant will not work in the following states: North Dakota, Ohio, Washington and Wyoming.

IBP and the claimant executed several IBP's Independent Contractor Agreements for the entire time the claimant was engaged, i.e., from January 4 through December 31, 2018, from January 1 through March 31, 2019, and from April 1, 2019 through March 31, 2020. Except for slight variations in the language for services to be performed, these Agreements are almost identical in form and substance that contain, in relevant part, the following provisions:

- * The claimant shall not perform any "warehouse work, lifting, driving or anything unsafe".

- * The claimant shall not work in the following states: North Dakota, Ohio, Washington and Wyoming.

- * The services to be performed include bookkeeping, data entry and general administrative tasks using Japanese and English language skills, the claimant's schedule to be about 3 days per week, and the claimant may be

requested to participate in business trips a few times a year.

- * IBP shall pay \$24 per hour to the claimant.

- * The claimant shall "submit a time sheet" to IBP as an invoice; and IBP shall remit payment by regular mail within 15 business days.

Pursuant to the Independent Contractor Agreements, the claimant provided administrative services at NHK's premises from January 2018 through September 12, 2019. NHK provided an ID pass for the claimant to enter NHK's office. NHK provided claimant with a desk and computer. NHK's executive producer set claimant's work schedule, which was generally the same through the week. The executive producer requested notice of when claimant would be absent and supervised claimant's work. NHK did not provide any training. NHK provided the claimant with a binder, prepared by a previous administrative assistant, detailing the steps to carry out the duties and function of anyone performing such role. For example, the claimant retrieved lunchboxes, read scripts, searched and purchased images with the producer's credit card, reserved hotel stays for TV crews, coordinated equipment, crews and drivers for location shoots, and attended meetings that were generally held on Tuesdays.

IBP provided the claimant with weekly timesheets with rows and columns to be filled in for pertinent days and hours of work. Bearing IBP's name and address at the top of the timesheet, it also provides the following information:

IMPORTANT FOR CLIENT: Execution of this form by the client constitutes a certification, that the total hours stated above are correct, and the work was performed in a satisfactory manner.

IMPORTANT FOR TEMP WORKER: All hours must be approved by an authorized representative of the client, and the temp worker needs to submit this timesheet to IBP as an invoice.

We will round to the nearest quarter hour to calculate your pay.

The temp worker is permitted to work overtime only with the approval of the authorized representative of the client. Work in excess of 40 hours in a week will be paid at one and one-half your regular rate.

The break time of a temp worker is determined by an authorized representative of the client. When working a full day, we recommend that you take at least a 30-minute break.

Generally, the claimant completed the timesheets on a weekly basis, and for the most part had NHK's executive producer sign the timesheets as the "Client's Signature of Acceptance". She electronically submitted the timesheets to IBP monthly. IBP sent invoices to NHK pursuant to the Staffing Agreement, initially at \$40

per hour that was modified to \$38 per hour. For the entire time the claimant was engaged, IBP paid claimant \$24 per hour and issued a check monthly in claimant's personal name. When NHK stopped paying IBP for about three to four months, IBP continued to pay the claimant. On another occasion, upon NHK's objection to an invoice, the claimant admitted to IBP that she was not in the U.S. and did not work during a specified time (submitted timesheets without NHK's verification), which payments to the claimant were recouped for NHK's credit. IBP issued IRS 1099 forms to the claimant in her personal capacity.

The timesheets show that the claimant worked a varied schedule from week to week. On numerous occasions, NHK complained to IBP regarding claimant's attendance and random work hours. IBP addressed these concerns with the claimant. IBP also created, and recommended the claimant to use, a vacation request form to be given to both IBP and NHK on those occasions when she needed to leave early or be absent. The claimant also complained to IBP about her treatment (e.g., being yelled at) by some individuals at NHK.

OPINION: The credible evidence establishes that IBP exercised, or reserved the right to exercise, sufficient supervision, direction or control over the services of the claimant to find an employer-employee relationship. Here, IBP had previously screened the claimant and had her contact information within its database. IBP referred the claimant to its client that executed IBP's Staffing Agreement that required the client to pay IBP at least \$38 per hour, that permitted IBP to pay the claimant \$24 per hour, that prohibited the client from hiring the claimant during the term of the "Agreement and thirty-six months thereafter", and that prohibited the client from having the claimant work at a "warehouse, factory, or any other dangerous place". The claimant accepted IBP's hourly set rate and executed IBP's Independent Contractor Agreements that outlined some of her duties as an administrative assistant, that set her payrate of \$24 per hour, and that required her to use and submit IBP's timesheets. Significantly, not only did IBP reserve the right to round to the nearest quarter hour to calculate claimant's pay and to pay for overtime at one and one-half the regular hourly rate, but IBP continued to

pay the claimant for several months without receiving remittance from its client. Moreover, IBP fielded complaints from the claimant as well as the client, and required the claimant to use IBP's vacation request form to help resolve the discord.

Even though IBP did not directly supervise the claimant's daily activities, this Court has held that a business that selects and offers screened professionals to provide services to its clients at a set rate has exercised sufficient control to create an employment relationship. See e.g., *Matter of David Gentile Nursing Services PC*, 65 NY2d 622 (1985), rev'g 106 AD2d 763 (3d Dept 1984); *Matter of Millennium Medical Care, P.C.*, 175 AD3d 755 (3d Dept 2019); *Matter of Dillon (Human Care LLC)*, 163 AD3d 1307 (3d Dept 2018); *Matter of Williams (Summit Health Inc.)* 146 AD3d 1210 (3d Dept 2017); *Matter of Yuan (Legal Interpreting Svcs., Inc.)*, 140 AD3d 1550 (3d Dept 2016); *Matter of Ritch (Island Tutoring Center, Inc.)*, 139 AD3d 1151 (3d Dept 2016); *Matter of Ryan (La Cruz Radiation Consultants Inc.)*, 138 AD3d 1324 (3d Dept 2016); and *Matter of Lobban (Precinct Security and Investigations Inc.)*, 131 AD3d 1294 (3d Dept 2015).

Matter of Cruz (Strikeforce Staffing LLC), 204 AD3d 1348 (3d Dept 2022) is readily distinguishable. In that case, the "client, not Strikeforce, would provide the worker" with (1) the "rate of pay" that could be "negotiate[d] with the client" and (2) the worker's schedule; the worker "negotiate[d] a higher rate of pay" with the client part way through the engagement; and the record was "silent as to whether a worker would be paid" if a client did not pay Strikeforce. Also, Strikeforce's one-page independent contractor contract required that the worker contact only the client regarding absences, and "Strikeforce in no way evaluated any aspect of the worker's performance." Here, however, IBP set the claimant's rate of pay that was not negotiated; IBP rounded to the nearest quarter hour to calculate claimant's hourly pay; IBP was willing to pay for overtime at one and one-half the regular hourly rate; IBP continued to pay the claimant for several months without payment from its client; and IBP apparently paid the claimant for times not worked based on unverified timesheets for which IBP credited NHK. And IBP's Independent Contractor Agreement precluded the claimant from performing certain tasks and from working in specified locations and four States, outlined claimant's job duties, laid out claimant's general work schedule, and directed the claimant to submit IBP's timesheets to IBP that were verified by the client. Moreover, by addressing NHK's complaints with the claimant, IBP, in effect, evaluated the claimant's

performance, including IBP's implementation of a vacation request form to be used and given to both IBP and NHK.

For similar reasons, we also distinguish *Matter of Desravines* (Logic Corp.), 146 AD3d 1205 (3d Dept 2017). In that case, Logic's client offered the worker the position and set the hourly rate with some negotiation, Logic billed its client for the worker's services and its fee but did not pay claimant unless the client paid Logic, and Logic did not evaluate the worker's work. Unlike that case, in the case at hand, IBP offered the claimant the position; IBP was willing to pay for overtime at one and one-half the regular hourly rate set by IBP without negotiation; IBP paid the claimant without payment from NHK for several months; and IBP evaluated the claimant's work when addressing NHK's time and attendance complaints.

Although IBP argues that the contract language stating that the claimant was an independent contractor is controlling, the Court has repeatedly held such language is not determinative. See e.g., *Matter of Baez* (PD 10276 Inc., DBA Jan-Pro Cleaning Systems), 143 AD3d 1190 (3d Dept 2016); and *Matter of Isaacs* (Speedy Media Associates LLC), 125 AD3d 1077 (3d Dept 2015). IBP's other contentions, including manner of the loss of employment, have been considered and are without merit.

We further note the legislature's codification of the foregoing common law to hold individuals to be employees of a referral agency that refers them to work at its client's premises and that pays them their salary. Namely, Labor Law §

512(4) (effective January 1, 2020), states as follows:

Whenever the commissioner determines that services performed by an individual constitute employment but the supervision, direction and control are exercised by one or more entities, and one entity places the individual with, or provides the individual to, another entity to perform the services, the entity that pays the individual for the services shall be the employer under this article unless by contract the individual is specified to be the employee of another entity, in which case the other entity shall be the employer. Whenever such employer is replaced by another entity such replacement shall be considered a transfer pursuant to section five hundred eighty-one of this article. This subdivision shall not apply to a payroll agency that the commissioner determines provides payroll services on behalf of another

employer. (Underlining added.)

Here, there is no dispute that IBP is the "one entity [that] places the [claimant] with ... another entity to perform the services", namely, at NHK, and that IBP "pays the [claimant] for the services". Also, as no contract evidence specified that the claimant was an "employee of another entity", including NHK, the claimant is deemed a statutory employee of IBP, at least from January 1, 2020.

Under these circumstances, we conclude that the claimant and any other administrative assistants similarly situated are deemed employees of IBP for purposes of unemployment insurance. Accordingly, the initial determination holding IBP liable for unemployment insurance tax contributions as the true employer, and the initial determination holding NHK not to be the true employer, should be sustained.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, holding International Business Promotion, Inc. liable for tax contributions effective first quarter 2018 based on the independent contractor misclassification of the claimant and any other individual similarly employed by IBP as an administrative assistant deemed to be in covered employment, which credited the claimant with remuneration from IBP regarding the claim for benefits effective September 23, 2019, is sustained.

(Combined Appeal Board Nos. 612243 & 612287 and A.L.J. Case Nos. 020-03355 & .)

IBP is liable with respect to the issues decided herein.

The initial determination, holding that NHK Cosmomedia America, Inc. is not the true employer of the claimant, and that credited the claimant with remuneration from IBP regarding the claim for benefits effective September 23, 2019, is sustained.

(Combined Appeal Board Nos. 612285 & 612286 and 020-03352 & 020-05593.)

NHK is not liable with respect to the issues decided herein.

The claimant is deemed an employee of and is credited with remuneration from IBP.

RANDALL T. DOUGLAS, MEMBER

1 Although the Department of Labor's initial determination dated November 4, 2019, holding International Business Promotions to be the true employer of the claimant (Eriko Ito, inadvertently typed as Eriko Ho), states that claimant provided services as a temporary "production manager", the record clearly reflects that the claimant provided services as an "administrative assistant" to IBP's client, NHK Cosmomedia America, Inc.

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